No. 10217

United States
Circuit Court of Appeals
For the Ninth Circuit.

KENNETH R. GREENWOOD, Administrator of the Estate of Charles H. Greenwood, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

JOHN M. SCHWARTZ, Esq.,

For Comm'r.:

FRANK T. HORNER, Esq.,
R. C. WHITLEY, Esq.

Docket No. 104987

ESTATE OF CHARLES H. GREENWOOD, Deceased, KENNETH R. GREENWOOD, Administrator,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1940

Sep. 27—Petition received and filed. Taxpayer notified. Fee paid.

" 27—Copy of petition served on General Counsel.

Nov. 25—Answer filed by General Counsel.

" 25—Request for hearing in Los Angeles filed by General Counsel.

" 29—Notice issued placing proceeding on Los Angeles, Calif., calendar. Service of answer and request made.

1940

Dec. 10—Stipulation correcting amount of deficiency as disclosed in 90 day letter attached to petition filed.

1941

May 19—Deposition of Mrs. Albertine Greenwood filed. General Counsel and taxpayer served by notary.

Jul. 15—Hearing set Sept. 22, 1941 in Los Angeles, Calif.

Sep. 23—Hearing had before Mr. Disney on merits. Deposition of Mrs. Albertine Greenwood received and made a part of record. Briefs due 10/23/41—replies 11/7/41.

Oct. 3—Transcript of hearing of Sept. 23, 1941 filed.

" 20—Brief filed by taxpayer. 10/22/41 copy served.

" 22—Brief filed by General Counsel.

Nov. 7—Reply brief filed by taxpayer. 11/7/41 copy served.

1942

Apr. 3—Findings of fact and opinion rendered, Disney, Div. 4.

Decision will be entered under Rule 50. 4/4/42 copy served.

" 21—Computation of deficiency filed by General Counsel.

" 22—Hearing set May 20, 1942 on settlement.

May 4—Motion for reconsideration and vacate its decision filed by taxpayer. 5/5/42 denied.

" 20—Hearing had before Mr. Murdock on set-

1942

tlement under Rule 50. Respondent's computation not contested. Referred to Mr. Disney for decision.

May 29—Decision entered, R. L. Disney, Div. 4.

Jun. 29—Petition for review by U. S. District Court of Appeals, 9th Circuit, filed by taxpayer.

Jul. 13—Proof of service filed by taxpayer.

" 30—Statement of points filed by taxpayer.

" 30—Designation of record filed by taxpayer with proof of designation and statement of points thereon. [1*]

United States Board of Tax Appeals

Docket No. 104987

ESTATE OF CHARLES H. GREENWOOD, Deceased, KENNETH R. GREENWOOD, Administrator,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

Comes now the above named petitioner and hereby petitions for a redetermination of the deficiency

*Page numbering appearing at top of page of original certified Transcript of Record.

set forth by the respondent in his notice of deficiency dated the 22nd day of July, 1940, and herein petitioner alleges:

I.

That petitioner is the Estate of Charles H. Greenwood; that the said Charles H. Greenwood died testate on the 21st day of July, 1939, a resident of the county of Pima, state of Arizona; that Kenneth R. Greenwood of 1616 East 6th Street, Tucson, Arizona, was regularly appointed administrator of said estate and is now the duly appointed, qualified and acting administrator with-will-annexed of said estate; that the estate tax return in the matter involved herein was regularly filed with the Collector of Internal [2] Revenue, District of Arizona.

II.

That the notice of deficiency was mailed to petitioner on the 27th day of July, 1940; that a copy thereof is attached hereto marked "Exhibit A".

III.

That the taxes in controversy are federal estate taxes and that while respondent alleges a deficiency of $18,501.28, the amount in controversy is approximately $17,820.79.

IV.

That the respondent erred in his determination of said deficiency, specifically as follows:

Assignment of Error No. 1.

The respondent erred in finding that the

stocks, bonds, mortgages, notes, cash, and miscellaneous property, the valuation of which is shown on pages 2 and 3 of Exhibit A, was the separate property of Charles H. Greenwood and not the common or community property of said Charles H. Greenwood and his wife, because said property was owned by said Charles H. Greenwood and his wife equally at the time of his death and for many years prior thereto.

Assignment of Error No. 2.

The respondent erred in concluding that the whole of the value of the stocks, bonds, mortgages, notes, cash, and miscellaneous property shown on pages 2 and 3 of Exhibit A was taxable to petitioner, because one-half thereof was owned by the wife of said Charles H. Greenwood at the time of his death. [3]

IV.

That the facts upon which petitioner relies to sustain the foregoing assignments of error are as follows:

1. That the said Charles H. Greenwood and Albertine Greenwood were husband and wife at the time of the death of Charles H. Greenwood on the 21st day of July, 1939, and for many years prior thereto; that in or about the year 1927 they moved to the state of Arizona and from that time to the date of the death of the said Charles H. Greenwood they were bona fide residents of that state; that during most of the years of their mar-

ried life prior to the year 1927 they were residents of the state of New York.

2. That at the time of the death of said Charles H. Greenwood, he and the said Albertine Greenwood held property of the value of $251,966.58; that of said property, property of the value of $16,-360.38 was the separate property of the said Charles H. Greenwood and at the time of his death was held in a trust created by him on or about the 2nd day of November in the year 1928; that the rest of said property, consisting of real estate, stocks, bonds, mortgages, notes, cash, and miscellaneous property, the value of which is shown on pages 2 and 3 of Exhibit A and aggregates $235,-606.20, was at said time the common and community property of the said Charles H. Greenwood and the said Albertine Greenwood.

3. That said property of the value of $235,-606.20 was acquired by the said Charles H. Greenwood and Albertine Grenwood by and through their joint efforts during the period of their marriage.

[4]

4. That at or about the time they became residents of the state of Arizona, and on occasions too numerous to mention thereafter, the said Charles H. Greenwood and the said Albertine Greenwood, cognizant of the community property laws of the state of Arizona, discussed their respective property interests and mutually agreed and understood that all property accumulated by them during their marriage, except that set aside in trust as the separate property of Charles H. Greenwood, was, and should

be, the common property of both and that such property should assume, and did assume, the nature of community property acquired by husband and wife by joint effort while domiciled in the state of Arizona; that pursuant to said agreement and understanding the said Charles H. Greenwood and the said Albertine Greenwood, at all times during their period of residence in the state of Arizona as husband and wife, mutually observed an equality of interest in all such property; that they maintained during said time a joint safe deposit box in which they kept all their securities and valuable papers, and access to which was enjoyed without restriction by each of them; that the stocks, bonds, mortgages, notes, and deeds to the real estate, the values of which are set forth on pages 2 and 3 of Exhibit A, were held by the said Charles H. Greenwood and said Albertine Greenwood in said safe deposit box at the time of his death on the 21st day of July, 1939; that the bank through which they transacted business in the city of their residence at the time of the death of said Charles H. Greenwood was the Southern Arizona Bank & Trust Company of Tucson; that all of the money on deposit by [5] them, or either of them, in said bank at said time was in accounts standing in both their names; that all of said property of the value of $235,606.20 was the common and community property of the said Charles H. Greenwood and the said Albertine Greenwood at all times after its acquisition subsequent to the time they became bona fide residents of the state of Arizona.

5. That within the time prescribed by law the said Kenneth R. Greenwood, as administrator with-the-will-annexed of the estate of Charles H. Greenwood, deceased, filed with the Collector of Internal Revenue at Phoenix, Arizona, an estate tax return on which was shown a total gross estate of $128,-658.69; that thereafter certain changes in valuation were made by the respondent as indicated on pages 2 and 3 of Exhibit A; that the total gross estate should have been shown on said return as $134,-163.48.

Wherefore petitioner prays that the determination of the respondent be reversed and set aside and that petitioner's estate tax liability be determined in accordance with the facts herein set forth.

JOHN M. SCHWARTZ
Attorney for Petitioner.
215 West 7th Street,
Los Angeles, California. [6]

(Duly verified.) [7]

EXHIBIT A

Treasury Department
Internal Revenue Service
Los Angeles, California

Jul 27 1940

Office of
Internal Revenue Agent in Charge
Los Angeles Division

Estate of Charles H. Greenwood, Deceased,

Kenneth R. Greenwood, Administrator,
1616 East 6th Street,
Tucson, Arizona.

Sir:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $16,823.49, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California for the attention of the Estate Tax Group Chief. The signing and filing of this form will expedite the closing of your return by permitting an early assignment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing

the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
By (Signed) George D. Martin
Internal Revenue Agent in
Charge.

Enclosures:
Statement.
Form of waiver. [8]

MT-ET-Arizona
Estate of Charles H. Greenwood
Date of death—July 21, 1939

STATEMENT

The deficieney results from the following adjustments:

GROSS ESTATE

Real Estate	Returned	Tentatively Determined	Determined
Item 1,.....	$ 6,000.00	$12,000.00	$ 6,000.00
" 2,.....	2,500.00	5,000.00	2,500.00
Stocks and Bonds			
Item 1,.....	2,205.00	2,200.00	2,200.00
Interest, ...	0.00	24.44	24.44
" 2,.....	1,025.00	1,100.00	1,100.00
5,.....	602.50	605.00	605.00
6,.....	1,027.50	1,022.50	1,022.50
Interest	0.00	35.00	35.00
7,.....	1,710.00	1,705.00	1,705.00
Interest	0.00	4.93	4.93
8, "	0.00	27.50	27.50
9, "	0.00	46.67	46.67
10,.....	4,565.00	4,570.00	4,570.00
Interest	0.00	8.76	8.76

Stocks and Bonds	Returned	Tentatively Determined	Determined
11, Interest	0.00	24.44	24.44
18,	118.75	881.25	881.25
19,	119,600.00	128,800.00	128,800.00
21, Dividend	0.00	9.60	9.60
23,	887.50	875.00	875.00
24,	643.50	646.75	646.75
25,	0.00	37.50	37.50
28,	0.00	600.00	600.00
Unchanged items	46,803.55	46,803.55	46,803.55
Total	179,188.30	190,027.89	190,027.89
Less one-half community	89,594.15	0.00	0.00
	89,594.15	190,027.89	190,027.89
Mortgages, Notes and Cash			
Travelers' checks	0.00	170.00	170.00
Unchanged items	26,708.31	26,708.31	26,708.31
Total	26,708.31	26,878.31	26,878.31
Less one-half community	13,354.15	0.00	0.00
	13,354.16	26,878.31	26,878.31
Other Miscellaneous Property			
Item 1,	350.00	700.00	700.00
" 3,	500.00	1,000.00	1,000.00

In view of the foregoing, the Federal estate tax liability of this estate is finally determined as follows:

	Determined
Gross estate	$243,466.58
Deductions (1926 Act)	120,966.13
Net estate (1926 Act)	122,500.45

MT-ET-Arizona
Estate of Charles H. Greenwood
Date of death—July 21, 1939

GROSS ESTATE (Cont'd.)

	Determined
Gross estate	$243,466.58
Deductions (1935 Act)	60,966.13
Net estate (1935 Act)	182,500.45
Gross tax, 1926 Act	$ 2,175.01
Credit for State estate, inheritance, legacy or succession taxes	62.22
Net tax, 1926 Act	2,112.79
Total gross taxes, 1926 and 1935 Acts	23,625.07
Gross tax, 1926 Act	2,175.01
Net additional tax	21,450.06
Net tax, 1926 Act	2,112.79
Total net tax	23,562.85
Tax shown on return	5,061.57
Deficiency	$ 18,501.28

The deficiency bears interest at the rate of six per cent per annum from fifteen months after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter, if a petition is not filed with the Board of Tax Appeals, $16,823.49 of the deficiency will be assessed. [10]

As the balance of the deficiency may be eliminated by credit for State or Territorial estate, inheritance,

legacy or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations 80. If, after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

A copy of this letter and statement has been mailed to your representative, John M. Schwartz, A. G. Bartlett Building, 215 East Seventh Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

[Endorsed]: U.S.B.T.A. Filed Sept. 27, 1940.

[11]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and avers as follows:

I, II, III

Admits the allegations contained in paragraphs I, II and III of the petition.

IV

Denies the allegations of error contained in paragraph IV of the petition.

IV 1

Admits so much of subdivision 1 of paragraph IV of the petition as alleges that the decedent and Albertine Greenwood were husband and wife at the time of the death of Charles H. Greenwood on the 21st day of July, 1939, and that during most of the years [12] of their married life they were residents of the State of New York, and denies all other allegations therein contained.

IV 2, 3, 4

Denies the allegations contained in subdivisions 2, 3 and 4 of paragraph IV of the petition.

IV 5

Admits the allegations contained in subdivision 5 of paragraph IV of the petition except that it is denied that the total gross estate should have been shown on said return as $134,163.48.

V

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

VI

Avers that the deficiency determined by the Commissioner in this case amounts to $18,501.28, as shown on page 3 of the deficiency notice, instead of $16,823.49 as set forth in line 2, page 1, of the deficiency notice.

The facts upon which the respondent relies to support his averment, as set forth in paragraph VI hereof, are as follows:

(a) Upon the basis of the respondent's determined gross tax under the Revenue Act of 1926, the estate appears to be entitled to a credit for state estate, inheritance, legacy, or succession taxes, in the amount of $1,740.00, provided proof [13] required by the Revenue Act and Regulations be submitted by the estate to the respondent. Of the said amount of credit to which the estate appears to be entitled, under the circumstances just recited, the respondent allowed as a credit the sum of $62.22, leaving $1,677.78 as a possible credit. The difference between the correctly determined deficiency of $18,501.28 and the credit to which the estate may be entitled, is $16,823.49, which last-mentioned amount was inadvertently entered on page 1 of the deficiency notice as the deficiency.

Wherefore, it is prayed that the Commissioner's determination be approved and that the amount of the deficiency determined by the respondent be found by the Board in the amount of $18,501.28.

(Signed) J. P. WENCHEL,
FTH
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
FRANK T. HORNER,
Special Attorneys,
Bureau of Internal Revenue.

FTH/q 11-20-40.

[Endorsed]: U.S.B.T.A. Filed Nov. 25, 1940.

[14]

[Title of Board and Cause.]

Docket No. 104987. Promulgated April 3, 1942

FINDINGS OF FACT AND OPINION

Held, that separate property was not transmuted into community estate by oral agreement between husband wife, under the law of Arizona.

John M. Schwartz, Esq., for the petitioner.
Frank T. Horner, Esq., for the respondent.

This proceeding involves Federal estate tax liability. The deficiency determined (as corrected by stipulation) is in the amount of $18,501.28. The issue presented is whether husband and wife, constituting a marital community in Arizona, by oral understanding transmuted separate property into community estate.

From allegations admitted in the pleadings and evidence adduced, we make the following findings of fact.

FINDINGS OF FACT

The estate tax return involved herein was filed with the collector of internal revenue for the district of Arizona, by the duly qualified administrator with will annexed of the estate of Charles H. Greenwood, who died testate on July 21, 1939. The decedent and Albertine Greenwood were married about 1899, and resided during the greater part of their married life in the State of New York.

For about 25 years decedent was employed by the Carborundum Co. at Niagara Falls, New York.

During the last ten years with that company he was general manager at a salary of $15,000 per year. About 1922, because of the condition of the health of decedent's son, the son and decedent's wife moved to Tucson, Arizona. The decedent remained in Niagara Falls, retaining his position with the Carborundum Co. and making frequent visits to his wife and son in Arizona from about 1922 until 1927. In January or February 1927, decedent inherited some property from his mother. The record does not show the amount of the inheritance, but it was "fairly sizeable", in the language of decedent's widow. In March 1927 he retired, resigning [15] his position with the Carborundum Co. and went to Arizona. Thereafter the decedent, his wife, and his son lived together at Tucson, Arizona, until the time of his death. He remained retired and did not engage in any occupation, profession or business until his death, but lived upon his investments and income from the time he went to Arizona. He established bank accounts prior to his retirement in Massachusetts, to which accounts his wife made no contribution. He also established bank accounts in Arizona in which the wife made no deposits. These consisted of a savings account in a bank at Phoenix, Arizona, and a savings account and a checking account in a bank at Tucson, Arizona. Upon the accounts in Tucson either the petitioner or his wife could draw. Both signed the signature cards for both accounts, and on the card for the checking account the bank was

specially authorized in writing by the decedent to accept the endorsement of his wife upon all checks made to him personally for deposit. The checking account, established in 1928, was to the credit of "Greenwood, C. H., or Albertine, Either or Survivor of Either." Dividends from stock in the Carborundum Co. were deposited in the checking account and C. H. Greenwood checked upon that account in buying stocks up to the time of his death. In addition, a safe deposit box was in 1928 rented from the bank under a contract signed by both husband and wife and reciting in part:

We, the undersigned, joint renters of the above numbered Safe Deposit Box from the Southern Arizona Bank & Trust Company, (hereinafter called the Bank) hereby declare and represent that we own as joint tenants, with the right of survivorship, all the property of every kind or character now within said box and that all property which may be deposited therein by either or any of us shall be and is owned by us as such joint tenants.

We, jointly and severally, authorize the Bank to grant access to said Box, to either or any of us or the duly appointed deputy of either or any of us and we hereby expressly agree that the Bank is authorized to permit the surrender of the box and or the removal of the entire contents thereof, by either or any of us without notice to the others or to the survivor of us.

And we hereby, jointly and severally, for ourselves, our executors, administrators and assigns

hereby bind and obligate ourselves to indemnify, protect and save the Bank harmless from any loss, claims or damage it may be caused, or any expense of any kind or character it may or shall be compelled to incur by reason of its reliance in and acting upon the declarations and representations herein contained in granting access to and the removal of the contents of said box by either or any of us or the duly appointed deputy of either or any of us or by the survivor.

The undersigned in consideration of the letting of the above numbered safe deposit box by the Bank acknowledge receipt of two keys thereto and certify that they have read, received a copy and approve of the Bank's rules governing safe deposit boxes as printed on the reverse hereof and do hereby adopt and accept said rules and conditions as part of this rental contract.

1. Signature C. H. GREENWOOD.
2. Signature ALBERTINE GREENWOOD.

[16]

At the date of the death of the decedent the safety deposit box contained the assets, securities, and other documents of title and certificates evidencing the stocks and bonds held by the decedent at the time of his death and listed on the estate tax return filed. Of the assets so listed, valued in the return at $240,956.99, the sum of $179,188.30 represented stocks and bonds, and $26,708.31 represented deposits in bank, of which $4,320.01 was in the savings account in the Tucson, Arizona,

bank in the name of "Greenwood, C. H., or Albertine", $3,553.52 was in the checking account in the name of Greenwood, C. H., or Albertine, Either, or Survivor of Either" above referred to, and the remainder, $18,834.78, represented savings accounts in decedent's name in cities in Massachusetts; Los Angeles, California; and Phoenix, Arizona.

The decedent allowed his wife $200 per month for household and personal expenses. He paid this amount to her when he was at home, and when he was out of the city, the wife customarily issued checks upon the account, ordinarily to the extent of $200 per month. At one time she paid hospital and other bills out of the amount, while her husband was in South America. She also in his absence paid premiums on her husband's life insurance policy out of the checking account.

At the time of the marriage of decedent and his wife, neither had any property, and with the exception of the inheritance from the decedent's mother in 1927, and $1,000 inherited by the wife about 1937, the decedent's earnings constituted the income of the husband and wife. The wife was not engaged in any occupation or business, except that of a housewife. She deposited the $1,000 which she inherited in her own name and the amount was still on deposit in her name at the bank at the time of the hearing. She at one time had some stock in a railroad company, about 10 shares, which she acquired with money she had saved out of the $200 monthly allowance. The stock was later sold by

her husband in her absence. He put the money in stock of the American Woolen Co., in his own name. The dividend checks came to him. The dividends received thereon were sometimes kept by the husband and sometimes turned over to the wife. The husband always received the other income, including his salary, and handled it without control by the wife. She never received or requested an accounting from him. Although she had a key to the safety deposit box, she never went to the safety deposit box and never saw the contents thereof. She had seen some stocks and bonds and had had some in her hands, but all were in the name of the husband. The decedent never discussed tax returns with her, although he prepared and filed returns for both husband and wife, and told her he was so doing. [17]

In a general way the husband and wife discussed their property relations. He consulted her when real estate was bought, but there was no specific occasion upon which property was discussed. He always spoke of his property as being half hers and always referred to the fact that half of everything he had was hers. He used the expression community property, and always referred to the property as community property. It was her understanding that half of the ownership of the bank accounts was hers, that understanding being based upon different things that he told her.

The wife had a general knowledge of the stocks and bonds owned by her husband. She did not

know whether he had ever put any stock or bonds in her name. Their home when they lived in New York was in the name of both husband and wife, but, aside from that home and the bank accounts in Tucson, Arizona (and real estate in Arizona, and in the name of both and not herein involved), all other forms of property were carried by the husband in his own name. He never asked her opinion, permission, or advice about making sales or changes in the property. About a year before he died, the husband told the wife she was worth one-half of what he was worth, but she never had any written communication or document on the subject. Neither husband nor wife signed any written statement. He received his income from all sources and disposed of it as he saw fit. Once when the husband and wife had a disagreement, about a year before he died, he made the remark, "Well, half of everything I have is yours." He made that statement several times. He prepared the income tax returns for both, but she signed her own and he signed his. Her income as returned was slightly less than his. The conversations about community property and her interest were only occasional and the subject was not referred to often.

The decedent stated to an intimate friend while automobile riding in 1936 that one-half of all of his property belonged to his wife, that they had split everything they had fifty-fifty. On another occasion in 1938, in the course of a family argument the wife said to her husband in the presence

of the friend: "You know, Charles, that one-half of all we own belongs to me", and the husband stated: "That is correct, I know it as well as you do." In 1938 the decedent stated to the same friend that his wife was ill and that he wanted a will prepared so that if she passed away her community interest would not pass to the son, which would be embarrassing to him, and that he would like to have a will so that she could give her half to him, the decedent. At the date of decedent's death, his wife's will provided that all of her property go to him; and his will left [18] all of his property, except a certain trust estate not here involved, to his wife.

The son as administrator returned the property upon the Federal estate tax return as community property for the reason that his father always stated that he had believed that one-half of the property was his and one-half belonged to the wife, and the son wished to carry out his ideas in the administration of the estate. The estate tax return showed, as the separate property of the decedent, a trust estate of $16,360.38.

In determining the deficiency in estate tax herein, the Commissioner, with certain exceptions not material, computed gross estate without allowing a deduction of one-half as set up in the return under the claim of community property.

OPINION

Disney:

The question which we are required to answer

here is whether under the law of Arizona decedent's wife had a community property interest to be excluded from the computation of his estate. We are, of course, controlled herein by state law. Black v. Commissioner, 114 Fed. (2d) 355. See also Talcott v. United States, 23 Fed. (2d) 897.

The property involved is personalty, consisting of stocks and bonds, largely corporate stock of the Carborundum Co.; also cash. A portion of the property, the amount not shown except that it was "sizeable", was inherited by the husband, and inherited property is by the Arizona statute specifically excepted from community estate, so that with such a record we could not determine that any of the property was originally community. The evidence clearly indicates that the husband separately acquired the property prior to removal to Arizona. The petitioner pointedly disclaims any contention that the property was originally acquired as community property. We therefore hold that the property was originally the separate property of the decedent. The petitioner states the question as follows: "The primary question presented is that of transmutation by understanding and intention." We therefore examine the record to ascertain whether under all of the evidence it is shown that property originally separately owned by the decedent became that of a marital community in Arizona. The petitioner relies in substance upon the idea that there was a general understanding between the husband and wife that their property

was held as community estate, and upon statements which the husband made to the effect that half belonged to her and that the property was community. There was no written communication, understanding or document on the subject. The husband made such statements on two occasions to a friend and upon one occasion, in the presence of such [19] friend and in the course of a family argument, the wife said to her husband, "You know, Charles, that one-half of all we own belongs to me", to which the husband stated, "That is correct, and I know it as well as you do." This is the only occasion shown by the evidence where any agreement between husband and wife expressly appears. It is obvious, of course, that the oral statements above recited do not amount to a conveyance. The petitioner, however, urges that under the law of California such statements suffice to transmute separate property into community estate and urges us to follow such decisions. Under the law of California an executed oral agreement is sufficient transmutation of separate property into community. Schipper v. Penkalski, 115 Pac. (2d) 231; Yoakam v. Kingery, 126 Calif. 30, 58 Pac. 324; Estate of J. Harold Dollar, 41 B. T. A. 869; United States v. Goodyear, 99 Fed. (2d) 523. Title Insurance & Trust Co. v. Ingersoll, 94 Pac. 94; and Kaltschmidt v. Weber, 79 Pac. 272, indicate that in California express argument need not be shown if it is proven by the nature of the transaction or surrounding circumstances. Estate of Joe Crail, 46 B. T. A.—(Mar. 17, 1942).

We have for consideration here, however, not only the oral expressions above noted, but also documents in writing, signed by both husband and wife. In 1928, the year following that in which the decedent moved to Arizona, and several years before the family argument and statement above referred to, petitioner and his wife signed a contract of rental of safety deposit box from the Southern Arizona Bank & Trust Co. Therein, over their signatures, it is stated that they declare and represent that they own as joint tenants with the right of survivorship all of the property within or which may be deposited in the box, and that it shall be and is owned by them as such joint tenants. They jointly and severally authorized the bank to grant access to either of them, and jointly and severally obligated themselves to save the bank harmless. Further reference is made to the survivor. It is recited that the signers have read, received a copy of, and approved the bank's rules covering safe deposit boxes as printed on the reverse side. On the reverse side reference is made to the survivor.

On or about January 5, 1928, a checking account was opened in the same bank in the name of "Greenwood, C. H., or Albertine, Either, or Survivor of Either", that expression appearing on the signature cards which bear the signatures of C. H. Greenwood and Albertine Greenwood. In 1934 a savings account was opened in the same bank by "Greenwood, C. H. or Albertine", that expression appearing upon the signature card bearing the sig-

natures of C. H. Greenwood and Albertine Greenwood. [20]

All of the personalty and assets involved in this case, consisting of stocks, bonds, certificates, and documents of title, was, at the date of the death of the decedent, in the safe deposit box above described. Of the cash, $3,553.52 was in the joint checking account in the Tucson bank, $4,320.01 in the savings account therein, and $18,834.74 represents savings accounts in decedent's name in other banks. It is apparent that, if the decedent and his wife were at the date of his death the owners in joint tenancy of the property deposited in the safe deposit box and in the joint checking account, such property must be included in the gross estate of the decedent, under the provisions of section 302 (e), Revenue Act of 1926.[1] Moreover, the language

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[1]Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is

of the act seems specifically to cover the deposits both in safe deposit box and checking account. The petitioner argues that the doctrine of survivorship is not favored by the law in Arizona, and that it is a matter of intention on the part of the parties, In re Baldwin's Estate, 71 Pac. (2d) 791, and suggests that the right of survivorship in that state may have been abolished. However, upon examination of the Arizona statute and construction thereof by the Supreme Court of Arizona, we find that if the instrument expressly vests estate in the survivor, the right of survivorship exists, although proof of a contrary intention on the part of the parties would suffice to destroy the joint ownership. In re Baldwin's Estate, supra; Blackman v. Blackman, 43 Pac. (2d) 1011. Examination of the contract signed and entered into by the decedent and

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shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That were any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

his wife in renting the safe deposit box containing the larger portion of his estate indicates clearly to us that the instrument does "expressly vest the estate in the survivor" under the Arizona statute, section 986, Revised Code Arizona 1928, and negatives any idea of a contrary intent on the part of the signers. The provisions of such written agreement were [21] never revoked nor modified throughout more than ten years prior to the death of the decedent.

Agreements as to safe deposit boxes essentially the same as that above described have been held to preclude claims of community property by the California courts. In re Harris' Estate, 147 Pac. 967, involved a claim of community property. The husband and wife had orally agreed that property should be owned as joint tenants and their moneys were deposited in a bank in a joint account with a written agreement in the pass book reciting joint tenancy and survivorship. It was held that there was joint tenancy. The same court In re Gurnsey's Estate, 170 Pac. 402, considered a bank deposit in form to be paid to either husband or wife or the survivor, additions to become the property of the persons making the deposit as joint tenants, and concluded that community property deposited in such account passed out of the community at the time of the deposit and became the joint property of the husband and wife. In In re McCoin's Estate, 50 Pac. (2d) 114, it was held that a husband and

wife having community ownership of money converted same into joint ownership by the terms of a signed signature card similar to that hereinabove described. The card bore the recitation that the undersigned gave each other a joint ownership in moneys deposited or thereafter to be deposited, payable to either or the survivor. Young v. Young, 14 Pac. (2d) 580, involved a question of community property or joint estate in connection with the renting of a safe deposit box by a husband and wife, as herein, and which safety deposit box contained the personal property in question—stocks and bonds. An agreement in writing between husband and wife in renting the safety deposit box recited a declaration that the contents then or thereafter should be joint property with ownership in the survivor. In addition, somewhat similar to the situation herein, the husband and wife opened a "deposit account" in another bank with an agreement signed to the effect that moneys deposited should be paid by the bank to either or the survivor. The court held that the property was joint and not community estate, although the personal property involved was placed in the safe deposit box by the husband, whose executor contended that it was community as against the wife's claim by right of survivorship.

The above decisions clearly indicate, we think, not only the weight which should be given to the agreement of joint ownership as to the safe deposit

box and the joint bank account, but refute the petitioner's contention that joint tenancy can not be created by one person conveying to himself and another as joint tenants. In that respect see also Colson v. Baker, 87 N. Y. Supp. 238; In re Gaines' Estates, 100 Pac. (2d) 1055; In re Nelson's Estate, 286 Pac. 439. In [22] the light of such decisions we conclude that the evidence of oral understanding or agreement between the husband and wife here involved is not sufficient to indicate a change from the joint estate set up in writing in the safe deposit agreement and in the agreement as to the checking account. Indeed, it seems to us that in the light of such written agreement the oral statements later are explained and that they refer to the joint tenancy set up in writing. The oral references to community property and to ownership as half in each of the spouses may well have referred, in the minds of the decedent and wife, as laymen, to the joint estate in the property in bank. At least we think such references do not negative the written agreements or show an executed oral agreement sufficient under primary rules of law to overcome a previous written contract. We therefore hold that all property in the safe deposit box and in the checking account payable to either or the survivor was not community property, but joint estate, to be included in the estate of decedent. The record indicates plainly that the property did not originally belong to the survivor within the excep-

tion recited in section 302 (e) of the Revenue Act of 1926.

As to the remainder of the decedent's estate not appearing to have been covered by the written agreements as to joint ownership: We conclude that the evidence is not sufficient to indicate community property. Assuming that an oral understanding is sufficient to transmute separate estate into community property, under the law of the state in question, we note that the evidence as to oral agreement placed all property in the same category—the contention being that all was community and that everything was owned in like manner by the husband and wife. Having concluded that almost the entire estate was held in joint tenancy, we believe this indicates that the remainder was so held; or, if not, that the effect of the written evidence as to joint tenancy is such as to indicate that the separate estate of the husband in the other bank accounts is not shown to have been transmuted into community estate. The evidence is that all of his assets, including documents of title and certificates, were in the safe deposit box—which we above concluded contained property held by joint tenancy. The box, therefore, apparently contained the certificates of deposit by the husband in the other separate bank deposits in Massachusetts; Phoenix, Arizona; and Los Angeles, California, for they obviously are covered by the expression "assets, securities and other documents of title" and "certificates" used to describe the contents of the safe deposit

box. Certainly that they were not in such box is not shown by the record. The oral understanding relied upon by the petitioner can not, we think, overcome the presumption of correctness of the Commissioner's determination as to any property, in the [23] light of our conclusion as to the written agreements covering the joint bank accounts and deposits, for no distinction is made in the evidence as to oral agreement sufficient to separate one bank account from the other. Moreover, we find that section 265, Revised Code Arizona 1928, particularly provides that:

Whenever a husband and wife open a joint account with any bank, and either one dies, such bank shall pay to the survivor the amount standing to their joint credit and upon making such payment such bank shall be released from all further liability for such amount.

This section places the savings account in the Tucson bank in the same category as the other accounts where "survivor" is used. Since all bank accounts shown to enter into the computation of the estate, except those which we have above concluded represent joint estate, are in the name of the decedent, and certificates therefor were apparently in the joint safe deposit box, we conclude and hold that no sufficient showing of community estate therein has been made, and that error on the part of the respondent is not shown.

Decision will be entered under Rule 50. [24]

United States Board of Tax Appeals

Washington

Docket No. 104987.

ESTATE OF CHARLES H. GREENWOOD, Deceased, KENNETH R. GREENWOOD, Administrator,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Board promulgated April 3, 1942, the respondent on April 21, 1942, filed recomputation under Rule 50. Copy of said recomputation having been served on the petitioner, together with notice of hearing, and the proceeding having been called for settlement from the Day Calendar of May 20, 1942, at which time no objection was offered to the proposed recomputation, it is

Ordered and Decided: That there is a deficiency in estate tax in the amount of $18,491.76.

Enter:

Entered May 29, 1942.

(Signed) R. L. DISNEY

[Seal] Member. [25]

[Title of Board and Cause.]

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Kenneth R. Greenwood, as administrator of the estate of Charles H. Greenwood, deceased, and by his attorney, John M. Schwartz, respectfully petitions this Honorable Court to review the decision of the United States Board of Tax Appeals entered on May 29, 1942, and finding a deficiency in estate tax due from said estate in the amount of $18,491.76, and herein petitioner respectfully shows that:

I.

NATURE OF CONTROVERSY

The decedent, Charles H. Greenwood, and Albertine Greenwood were married in 1899, and they resided during the greater part of their married life in the State of New York. [26] In the year of 1927 they moved to the State of Arizona and from that time to the date of the death of the said Charles H. Greenwood they were bona fide residents of that State. Mr. Greenwood died testate on the 21st day of July, 1939, and thereafter Kenneth R. Greenwood was duly appointed administrator with will annexed of his estate. While it could not be ascertained from the decedent's records what portion of

the estate was acquired after he became a resident of Arizona, it is conceded that the greater part thereof, perhaps the nucleus of all, was acquired before that time.

Within the time prescribed by law the said administrator filed a federal estate tax return on which he listed all property held by the decedent at the time of his death and showed one-half of the value thereof as taxable on the theory that the property was the community property of the decedent and Mrs. Greenwood at the time of the decedent's death. The tax computed and paid by the administrator was $5,061.57. Thereafter the Commissioner of Internal Revenue caused an examination to be made of said return, and upon examination determined a tax liability of $23,562.85 and thereupon assessed a deficiency of $18,501.28.

Thereafter said administrator petitioned the United States Board of Tax Appeals for a re-determination of the tax liability of the estate, and the said Board upon hearing, rendered its decision and ordered and decided that a defic- [27] iency of $18,-491.76 existed.

The administrator, as petitioner before the Board, contended that all property held by decedent at the time of his death, except an interest in a trust fund not here in controversy, was community property. This contention was based upon the proposition that by virtue of mutual understanding and intention between Charles H. Greenwood and Albertine Greenwood, as husband and wife, and their acts in accord-

ance therewith, the property brought by them to the State of Arizona in 1927, and all income and increment thereof, became community property. The Commissioner of Internal Revenue as respondent before the Board contended that all property held in the name of the decedent at the time of his death was his sole and separate property. This contention was based upon the proposition that all property brought by the parties to the State of Arizona in 1927 was the sole and separate property of the husband by virtue of the law of the state in which it was acquired and that it remained the sole and separate property of the husband regardless of the alleged mutual understanding and intention and acts of the parties.

In due course after hearing the Board promulgated its findings of fact and opinion, concluding that the property in question was held by husband and wife at the time of decedent's death as joint property with right of survivorship, and therefore taxable in its entirety as the estate of the husband. [28]

Petitioner now contends that the facts found by the Board show that the property involved became community property under the law of Arizona, and that the conclusion of the Board is erroneous.

It is from the decision based upon that conclusion by the Board that the Petitioner herein seeks review.

II.

COURT IN WHICH REVIEW IS SOUGHT

Petitioner herein seeks review in the United

States Circuit Court of Appeals for the Ninth Circuit.

III.

FACTS SHOWING VENUE

At the time of his death the said Charles H. Greenwood was a resident of Tucson, Arizona.

The Federal estate tax return filed by the said administrator for the estate of the said Charles H. Greenwood, deceased, was filed with the Collector of Internal Revenue for the District of Arizona, at Phoenix, Arizona.

Hearing before the United States Board of Tax Appeals was had at Los Angeles, California, on the 23rd of September, 1941, Honorable R. L. Disney, presiding.

The decision of the United States Board of Tax Appeals was signed by R. L. Disney, member, and entered on the 29th day of May, 1942, in which it was ordered and decided that there is a deficiency in the estate taxes of $18,491.76. [29]

The jurisdiction in this Court to review the aforesaid decision of the United States Board of Tax Appeals is founded on Section 1141 of the Internal Revenue Code.

Wherefore your petitioner prays that this Honorable Court review the said decision and order of the United States Board of Tax Appeals and direct the said Board to make and enter a decision ordering and deciding that the property in controversy

was the community property of decedent and his wife at the time of his death, and petitioner further prays for the entry of said further orders and decisions as shall by this Court be deemed just and proper, in accordance with law.

JOHN M. SCHWARTZ
215 West Seventh Street,
Los Angeles, California,
Attorney for Petitioner.

[Endorsed]: U.S.B.T.A. Filed June 29, 1942. [30]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To the Commissioner of Internal Revenue, Washington, D. C., and J. P. Wenchel, chief counsel, Bureau of Internal Revenue, Washington, D.C.:

You are hereby notified that on the 29th day of June, 1942, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the United States Board of Tax Appeals heretofore rendered in the above entitled cause was filed with the Clerk of the Board, a copy of which petition is attached hereto and served upon you.

Dated 7th day of July, 1942.

JOHN M. SCHWARTZ,
Attorney for Petitioner,
215 West 7th St.,
Los Angeles, Calif.

Service of the foregoing Notice of Filing and a copy of petition for the review is hereby acknowledged.

Dated 13th day of July, 1942.

J. P. WENCHEL

[Endorsed]: U.S.B.T.A. Filed July 13, 1942. [31]

[Title of Board and Cause.]

PETITIONER'S STATEMENT OF POINTS AND DESIGNATION OF RECORD ON REVIEW

STATEMENT OF POINTS

The petitioner hereby sets forth the points on which he intends to rely on review, as follows:

I.

Upon the death of either husband or wife only one-half of the community property in which the parties had equal interests is subject to federal estate tax.

II.

The nature of property and the respective interests of husband and wife therein are determined by the law of the state in which the husband and wife reside, and upon the death of either that law controls in ascertaining the taxable estate of the decedent. [32]

III.

Under the law of the state of Arizona, the interests of husband and wife in community property are in all respects equal, the husband having no title superior to that of the wife.

IV.

Under the law of the state of Arizona, where either husband or wife has separate property and it is their intention to treat such property as the community property of both it becomes community property in accordance with their intent; and insofar as personal property is concerned it is not necessary that such transmutation be expressed formally, either verbally or in writing, as long as it can be fairly inferred from the circumstances that a community interest was intended.

V.

Joint tenancy is not a favorite of the law of Arizona, and where property is held by a husband and wife by an instrument expressly describing them as joint tenants with right of survivorship such property will be deemed to be community property if the parties so intend.

VI.

Under the law of the state of Arizona, where two or more persons hold property as joint tenants, and the [33] grant or devise does not expressly vest title in the survivor, the interest of a joint owner passes

to his heirs and beneficiaries upon his death as though severed prior thereto.

VII.

Under the law of the state of Arizona, a joint tenancy with right of survivorship can in no case be created by a transfer from one owner to himself and another as joint tenants with right of survivorship.

VIII.

In the instant cause the Board of Tax Appeals concluded upon its findings of fact that the property involved was joint tenancy property at the time of the decedent's death; and because such property was acquired by the decedent and his wife while they resided in a non-community property state the Board further concluded that all was subject to the federal estate tax. The petitioner, relying upon the foregoing points and the Board's findings of fact, contends that the property was community property and only one-half thereof subject to tax. **[34]**

DESIGNATION OF RECORD ON REVIEW

The petitioner hereby designates the parts of the record which he thinks necessary for consideration of the points on which he relies, as follows:

1. Petitioner's petition.
2. Respondent's answer.
3. Minute entries.
4. Board's findings of fact and opinion.
5. Board's decision.
6. Petitioner's petition for review.

7. Notice of filing petition for review.

8. Petitioners' statement of points and designation of record on review.

Dated at Los Angeles, California, the 15th day of July, 1942.

JOHN M. SCHWARTZ
215 West Seventh Street,
Los Angeles, California,
Attorney for Petitioner.

A conformed copy of the foregoing Statement of Points and Designation of Record on Review was duly received by the respondent on the date shown below.

Dated July 17, 1942.

J. P. WENCHEL
Atty. for Respondent.

[Endorsed]: U.S.B.T.A. Filed July 30, 1942. [35]

[Title of Board and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 35, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand

and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 31st day of July, 1942.

[Seal] B. D. GAMBLE
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 10217. United States Circuit Court of Appeals for the Ninth Circuit. Kenneth R. Greenwood, Administrator of the Estate of Charles H. Greenwood, Deceased, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed August 10, 1942.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit
No. 10217

ESTATE OF CHARLES H. GREENWOOD, Deceased, KENNETH R. GREENWOOD, Administrator,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S STATEMENT OF POINTS AND DESIGNATION OF RECORD ON REVIEW

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the petitioner and adopts as his points on appeal the statement of points appearing in the transcript of record, and he hereby requests that the transcript of record as certified to you be printed in its entirety.

Dated at Los Angeles, California, this 13th day of August, 1942.

JOHN M. SCHWARTZ
215 West Seventh Street,
Los Angeles, California,
Attorney for the petitioner.

[Endorsed]: Filed Aug. 15, 1942.